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## Retroactivity and Crack Sentencing Reform

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## RETROACTIVITY AND CRACK SENTENCING REFORM

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Harold J. Krent\*

*This Article argues that the strong presumption against retroactive application of reduced punishments articulated in the Supreme Court's recent decision, Dorsey v. United States, is neither historically grounded nor constitutionally compelled. Although not dispositive in Dorsey, the presumption may mislead legislatures in future contexts, whether addressing marijuana decriminalization or lessened punishment for file sharing, and in no way should signal to Congress that future changes should apply prospectively only.*

*Although the Court reached the right result in applying the reduction in punishment for crack offenses to offenders whose sentences had not been finalized, the Court relied excessively on the general Savings Statute enacted in 1871. Congress enacted that statute not to discourage retroactive decriminalization or diminution in punishment, but to avoid the consequence of abating pending prosecutions and penalties that, at common law, followed from alteration of a criminal statute. Congress wished to prevent release of offenders when it recodified a law or increased the punishment for an offense without explicitly specifying that prosecutions could continue under the former enactment. The Savings Statute currently should be understood as a default in the face of congressional silence; once it is clear that Congress considered the temporal scope of its action, the presumption should disappear.*

*The Article next explores whether alternative justifications support a strong presumption for prospective application of any legislative change. It initially turns to the norm against retroactive lawmaking. The conventional reasons for distrusting retroactive measures have little applicability in the context of legislative amelioration of punishment. The Article then considers two separation of powers concerns that might justify a rule against retroactive application of congressional leniency: first, whether Congress's reduction of sentences would interfere with the President's pardon authority under Article II, and second, whether Congress lacks the power to undo a final decision of the judiciary. The constitutional arguments raise no serious barrier to retroactive application of congressional leniency.*

*On the other hand, the Article rejects the notion that Congress, in light of equal protection principles, must benefit those who previously committed the offense. To be sure, ignoring the plight of prior offenders may seem grossly unfair, and deterrence is not a justifiable reason to treat similarly situated offenders so disparately. Nonetheless, the Article argues that retribution and institutional rationales can justify the differential punishment scheme and survive equal protection scrutiny.*

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*In short, because there are no compelling policy or constitutional grounds to presume that congressional leniency should apply prospectively only, Congress should be accorded the discretion to determine where to draw the line in determining the proper amount of retribution for those who committed offenses before the decriminalization or diminution in punishment.*

## INTRODUCTION

The racially tinged controversy over the disparities in sentencing between crack and powder cocaine finally received a Supreme Court audience in *Dorsey v. United States*.<sup>1</sup> There, the Court considered the retroactivity of the Fair Sentencing Act of 2010 (FSA),<sup>2</sup> which reduced the punishment for many crack offenses.<sup>3</sup> Congress, however, did not explicitly specify which group(s) of offenders would benefit from the reduced punishment—those previously sentenced, those whose sentences had yet to become final, or only those committing offenses after the FSA went into effect.

In a 5-4 decision, the Court in *Dorsey* held that Congress intended the new sentencing law to apply to the latter two groups.<sup>4</sup> In so doing, the divided Court permitted thousands of crack offenders to benefit from the shortened sentences, which the dissenters argued should only have applied more narrowly to those committing offenses post enactment.<sup>5</sup> Nonetheless, the Court's ruling left tens if not hundreds of thousands of those previously sentenced for crack offenses to languish behind bars for the duration of their original sentences, including those who committed the covered offenses on the very same day as Mr. Dorsey.

This Article considers the constitutional and policy ramifications at stake in determining the scope of congressional leniency. *Dorsey* affirms a presumption in favor of prospective application of legislative measures reducing punishment, which was overcome in the FSA context only by a combination of relatively unique factors pointing to a congressional expectation that the new Act would apply to offenders whose sentences had not been finalized. Although not dispositive in *Dorsey*, the presumption against retroactive application of ameliorative punishment may prove pernicious in future cases in which individuals seek to benefit from other sentencing

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1. 132 S. Ct. 2321 (2012).

2. Pub. L. No. 111-220, 124 Stat. 2372.

3. See 75 Fed. Reg. 66,188, 66,190-93 (2010). The FSA reduced "the crack-to-powder cocaine disparity from 100-to-1 to 18-to-1." *Dorsey*, 132 S. Ct. at 2326. Congress determined that crack was not as harmful as previously thought. See *id.* at 2328-29.

4. *Id.* at 2335.

5. See *id.* at 2339-40 (Scalia, J., dissenting).

changes, such as with the recent decriminalization of marijuana possession in Washington and Colorado,<sup>6</sup> or with possible future reduction in punishment for file sharing. The presumption in no way should signal to Congress a normative preference for prospective application; in many contexts, Congress should extend the benefits of diminished punishment to those previously sentenced. Indeed, in the crack context, why should prior offenders remain incarcerated under what Congress itself deemed unjustifiably long sentences?

This Article argues that the presumption against retroactive application of reduced punishments reflected in *Dorsey* is neither historically grounded nor constitutionally compelled. The majority opinion,<sup>7</sup> and even more so the dissent,<sup>8</sup> inordinately relied on the general Savings Statute enacted in 1871.<sup>9</sup> The Savings Statute embraced an interpretive principle that future congressional changes (not just reductions) in penalties would apply prospectively in the absence of a clear statement.<sup>10</sup> Congress, however, enacted the measure not to prevent retroactive decriminalization or diminution in punishment, but to avoid the consequence of abating pending prosecutions and penalties that, at common law, followed from alteration of a criminal statute.<sup>11</sup> Congress wished to avoid the bizarre consequence of offenders walking free merely because Congress recodified a law or even increased the punishment for an offense without specifying that prosecutions could continue under the former enactment.<sup>12</sup> A presumption of prospectivity for ameliorative measures therefore is unwarranted. Today, the Savings Statute should be understood as a default in the face of congressional silence. Once it is clear that Congress has considered the temporal scope of its action, the presumption should disappear.

Alternative justifications, however, might support a strong presumption for prospective application of any legislative change. The

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6. See Kristen Wyatt, *Colorado, Washington Pot Legalization: States Await Federal Response to Marijuana Measure*, HUFFINGTON POST (Nov. 10, 2012, 11:09 AM), [http://www.huffingtonpost.com/2012/11/10/colorado-washington-pot\\_n\\_2109400.html](http://www.huffingtonpost.com/2012/11/10/colorado-washington-pot_n_2109400.html). The state legislatures have not made such decriminalization retroactive.

7. *Dorsey*, 132 S. Ct. at 2330–31.

8. *Id.* at 2339–40 (Scalia, J., dissenting).

9. 1 U.S.C. § 109 (2006).

10. *Id.* (“The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing Act shall so expressly provide. . . .”).

11. *Dorsey* plausibly followed a number of precedents in articulating the presumption of prospectivity. See *infra* notes 22–34 and accompanying text.

12. See *infra* notes 26–40.

Article initially considers the well-entrenched norm against retroactive lawmaking. Although courts have been skeptical about retroactive policymaking,<sup>13</sup> the Article rejects the premise that the conventional reasons against retroactive measures have salience in the context of legislative amelioration of punishment; retroactivity in this context does not lead to unfair surprise and does not permit Congress to “single out” individuals for disadvantageous treatment.<sup>14</sup>

The Article then assesses two separation of powers concerns that might justify a rule against retroactive application of congressional leniency. First, the Article asks whether Congress’s reduction of sentences already meted out would interfere with the President’s pardon authority under Article II of the Constitution. If the pardon power is exclusive, then Congress cannot reduce the sentences of those previously convicted because of the Constitution’s separation of powers scheme. Indeed, a number of state courts have held that any such legislative efforts to mitigate punishment would be unconstitutional for that reason, and the Office of Legal Counsel in the Department of Justice has so opined.<sup>15</sup> Nonetheless, the Article concludes that the President’s pardon authority is not exclusive and that, as long as Congress chooses to diminish the sentence for a particular offense as opposed to an offender, no incursion into the executive pardon power arises.

Second, even if the Executive’s pardon power is not invaded, Congress arguably cannot undo a sentence issued by a federal court that has become final. In *Plaut v. Spendthrift Farm*,<sup>16</sup> the Supreme Court held that Congress lacks the power to nullify a final judgment.<sup>17</sup> As the decision suggests, Congress, as well as state legislatures, typically has stopped short of extending the benefit of reduced sentences or decriminalization to those whose convictions were previously final. The Article argues, however, that *Plaut* should not be seen as a bar to a congressional decision to open the jailhouse doors—a decision reducing a sentence, properly understood, does not undermine the finality of a decision.

At times, retroactive application of ameliorative legislation reflects compelling policy. If Congress decides that a reduced sentence is sufficient to deter crime henceforth, greater punishment is not needed for those who previously committed the

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13. See *infra* Part II.

14. See *infra* text accompanying notes 72–78.

15. See *infra* text accompanying notes 87–92.

16. 514 U.S. 211 (1995).

17. *Id.* at 240.

offense. Edward Dorsey, for example, committed his offense in August 2008. Presumably there are hundreds if not thousands of crack offenders from that period who agreed to plea bargains before the Fair Sentencing Act was enacted and therefore are not entitled to the reduced punishment.<sup>18</sup> That those committing the same crime on the same day face such different punishment merely because of the timing of their sentences raises a disparity perhaps nearly as troubling as the racial disparity sparking the social debate over the gap in sentencing between crack and cocaine offenses.<sup>19</sup> Although the majority addressed the importance of “uniformity and proportionality” in reaching its decision,<sup>20</sup> it made only passing mention of crack offenders in prison whose sentences had become final before enactment of the Fair Sentencing Act.<sup>21</sup> The Court’s decision would have stood on firmer ground had it canvassed the institutional reasons that likely led Congress to withhold the benefit of reduced punishment from such offenders—in particular Congress’s concern about unraveling the plea bargaining that underlay prior sentences.

In sum, there are no sound policy reasons or constitutional grounds to presume that congressional leniency should apply prospectively only. Congress should be accorded the discretion to determine where to draw the line in determining the proper amount of retribution for those who committed offenses prior to the decriminalization or diminution in punishment. As a consequence, the touchstone in each case should be congressional intent shorn of any interpretive presumption from the 1871 Savings Statute once the court is convinced that there was no legislative inadvertence.

#### I. THE SAVINGS STATUTE AND THE PRESUMPTION OF PROSPECTIVITY

To the Court, resolution of *Dorsey* turned in part on application of the Savings Statute.<sup>22</sup> If the Savings Statute created a strong presumption against retroactive application of statutory reductions in punishment, then only changes in the FSA that clearly indicated

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18. The median time between indictment and sentencing for such offenses is eleven months. *Dorsey v. United States*, 132 S. Ct. 2321, 2333 (2012).

19. For a discussion of the racial implication of the sentencing disparity, see, e.g., LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375 (2011); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1223 (1996).

20. *Dorsey*, 132 S. Ct. at 2328.

21. *Id.* at 2335–36.

22. *See id.* at 2331.

retroactivity would be applied to offenders who committed antisocial acts prior to the FSA's enactment.<sup>23</sup> The Court stated as much in *Warden v. Marrero*,<sup>24</sup> explaining that "the savings clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of the offense."<sup>25</sup>

As the history of the Savings Statute demonstrates, however, the Savings Statute was fashioned to prevent offenders from escaping punishment because of the common law abatement doctrine, not to create a strong presumption against retroactivity.<sup>26</sup> The Court explained in *Marrero* that "[c]ommon-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties."<sup>27</sup> At common law, any legislative change in a criminal statute was treated as a repeal, and thus all pending prosecutions under the former statute were discontinued.<sup>28</sup> For example, in *United States v. Tynen*,<sup>29</sup> which was pending when Congress passed the Savings Statute, the Court held that, when Congress passes a new act that wholly subsumes the prior parts, the old act is repealed and all criminal proceedings under it must cease.<sup>30</sup> It concluded that "[b]y the repeal the legislative will is expressed that no further proceedings be had under the act repealed."<sup>31</sup>

In other words, when Congress decriminalized offenses, it may have been logical to presume that no further prosecutions were intended.<sup>32</sup> However, the presumption seems less compelling when Congress increased the penalty for a crime. Yet, the abatement doctrine applied in that context as well, ending pending prosecutions and enabling offenders to walk free<sup>33</sup>—a conclusion at odds with common sense. The abatement doctrine may well have arisen from

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23. Cf. *id.* at 2331–32 (noting that Congress can pass statutes that exempt current legislation from being bound by prior legislation).

24. 417 U.S. 653 (1974).

25. *Id.* at 661.

26. S. David Mitchell, *In with the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM L. 1, 24–25 (2009).

27. 417 U.S. at 660.

28. Mitchell, *supra* note 26, at 25.

29. 78 U.S. (11 Wall.) 88 (1870).

30. *Id.* at 93, 95.

31. *Id.* at 95.

32. As Chief Justice Marshall stated in *Yeaton v. United States (The General Pinkney)*, 9 U.S. (5 Cranch) 281 (1809), "after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* at 283.

33. See *infra* text accompanying notes 35–38.

a formalistic view that the prosecution had to stop because the statute on which the prosecution was based was no longer in existence.<sup>34</sup>

As an example, consider *Lindsey v. State*.<sup>35</sup> There, the crime in question punished carrying concealed weapons.<sup>36</sup> The Legislature amended the statute to, among other changes, provide for a minimum twenty-five dollar fine, which was an increase in punishment.<sup>37</sup> The Court held that individuals whose punishments had not become finalized at the time of the amendment had to be released because of the abatement doctrine even though both the prior and subsequent legislation plainly criminalized the conduct.<sup>38</sup> Retroactive application of the enhanced penalties may have violated the Ex Post Facto Clause, but surely the Legislature intended the former penalties to remain in force for all offenders whose sentences had yet to be finalized, even if the enhanced penalties could not be applied. Although the doctrine makes little sense to contemporary ears and long has been criticized,<sup>39</sup> its relevance here is that it spawned the Savings Statute. Because Congress did not wish to let offenders fall through the cracks due to its own oversight, it created the Savings Statute to signify that, as a default, pending prosecutions were to be continued or “saved” despite an alteration to the operative criminal provision.<sup>40</sup>

The Savings Statute provides that:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability under such statute, unless the repealing Act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.<sup>41</sup>

Most importantly, the Statute reverses the common law abatement rule and provides that prosecutions under amended statutes can continue, irrespective of whether the subsequent Congress sought to increase or decrease the penalty.

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34. See, e.g., *The Queen v. Denton*, (1852) 118 Eng. Rep. 287 (Q.B.) 291 (“[t]he repealed statute is, with regard to any further operation, as if it had never existed.”).

35. 5 So. 99 (1888).

36. *Id.* at 99.

37. *Id.*

38. *Id.* at 100–01.

39. See, e.g., Albert Levitt, *Repeal of Penal Statutes and Effect on Pending Prosecutions*, 9 A.B.A. J. 715 (1923).

40. See *infra* text accompanying notes 41–45.

41. 1 U.S.C. § 109 (2006).



Consider *United States v. Barr*.<sup>42</sup> There, authorities arrested Barr for counterfeiting, and before his trial Oregon altered the law to require proof of “an intent to defraud.”<sup>43</sup> Barr argued that he could no longer be prosecuted even under the former Act.<sup>44</sup> The court stated that it would have agreed with Barr but for operation of the Savings Statute:

This . . . is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the states and the United States, it would have prevented many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the [L]egislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses . . . from the effect of express or implied repeals.

The Statute intended to prevent “lame” legislative mistakes when Congress altered criminal statutes, such as wording changes and consolidation among provisions.<sup>45</sup> The vice in particular was not retroactive amelioration but rather the unanticipated abatement of criminal prosecutions whenever the statutes were modified.

The Savings Statute also provides that penalties imposed on individuals by virtue of the prior statute will not be removed merely by virtue of the statute’s “repeal,” which courts have construed to apply to any emendation.<sup>46</sup> Congress feared the unintended results that flowed from the abatement doctrine. To use the example from *Lindsey*, an individual convicted of carrying a concealed weapon would not be released merely because the statute had been amended and the penalties increased in the future.

The Court in *Dorsey* correctly noted that the Savings Statute also covers congressional reduction of punishment. However, Congress intended the Savings Statute to cover both situations—when Congress increased or decreased a penalty—to ensure that prior offenders were not let out of jail through legislative inadvertence as discussed in *Barr*.<sup>47</sup> The Savings Statute, therefore, in addition to overruling the common law abatement doctrine, was a call to future

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42. 24 F. Cas. 1016 (D. Ore. 1877) (No. 14,527).

43. *Id.* at 1016.

44. *Id.* at 1016–17.

45. *See id.*

46. *See Warden v. Marrero*, 417 U.S. 653, 660 (1974) (noting that statutes were even considered to be repealed because of a change in the associated penalties).

47. *Barr*, 24 F. Cas. at 1017.

congresses to take care in specifying the temporal reach of any new statute.<sup>48</sup>

The Supreme Court in *Hamm v. City of Rock Hill*<sup>49</sup> cautioned that the Savings Statute was “meant to obviate mere technical abatement.”<sup>50</sup> In *Hamm*, the Court addressed the retroactive application of Congress’s passage of the Civil Rights Act of 1964<sup>51</sup> to prosecution of sit-in demonstrators. The Act decriminalized the acts for which the protestors had been arrested and convicted.<sup>52</sup> The government relied on the Savings Statute in arguing that the prosecutions should continue, but the Court disagreed, reasoning that the Civil Rights Act effected a “drastic” change, which Congress intended to apply retroactively.<sup>53</sup> *Hamm* suggests that the principle of prospective application imposes only a burden of production—as long as the defendant can marshal evidence that Congress intended the reduction in penalty to apply retroactively, the presumption of prospective application disappears.<sup>54</sup> On the other hand, if the legislation is silent, then the reduction in penalties should be applied prospectively only.

Indeed, a number of states have construed general savings clauses to apply only to legislative changes that increase penalties.<sup>55</sup> As the Supreme Court of Indiana explained, “enactment of a[n] ameliorative sentencing amendment was, in itself, a sufficient indication of the legislative intent that it be applied to all to whom such application would be possible and constitutional, thereby obviating application of the general saving statute.”<sup>56</sup>

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48. Furthermore, the Court in *Dorsey* noted the limits that Congress can place on its successors, another reason to read the Savings Statute to reflect a default provision rather than a strong presumption. 132 S. Ct. 2321, 2331–32 (2012).

49. 379 U.S. 306 (1964).

50. *Id.* at 314.

51. 42 U.S.C. § 1971 (2006).

52. *Hamm*, 379 U.S. at 307.

53. *Id.* at 314.

54. In this respect, the burden is akin to a *Thayer* evidentiary presumption, which was dominant at the time that the Savings Statute was enacted. *See, e.g.*, JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2490–91 (3d ed. 1940); *see also* *Wright v. Ford Motor Co.*, 508 F.3d 263, 273 n.9 (5th Cir. 2007) (“A *Thayer*-type presumption shifts only the burden of production to the opponent of the presumption. . . . If the opponent meets this burden, the presumption disappears . . .” (citation omitted)).

55. *See, e.g.*, *In re Estrada*, 408 P.2d 948, 951–53 (Cal. 1965); *People v. Oliver*, 134 N.E.2d 197, 200–01 (N.Y. 1956); *People v. Schultz*, 460 N.W.2d 505, 512 (Mich. 1990).

56. *Lewandowski v. State*, 389 N.E.2d 706, 707 (Ind. 1979). The Texas Criminal Code provides that, when the Legislature alters a penalty, the offender may choose either the prior or new penalty. Tex. Pen. Code arts. 13, 15.

Over time, federal courts have interpreted the Savings Statute to encompass a normative view about the scope of the retroactive relief that Congress wishes to afford.<sup>57</sup> However, it does nothing of the sort. The Savings Statute should only be triggered when Congress is completely silent as to temporal scope. The historical anomaly of abatement has misled members of the Court into reading into the Savings Statute a strong congressional presumption that legislative amelioration not be retroactive. The presumption makes little sense given the limited purpose of the Savings Statute at common law. The sparse legislative history rather suggests that Congress viewed the Savings Statute as a technical amendment designed to help codifiers.<sup>58</sup>

Thus, the Court in *Dorsey* should have gone further to reduce courts' reliance on the Savings Statute when construing statutes that reduce punishment. The Court held that any such legislative change should be applied retroactively only when "ordinary interpretive considerations point clearly in that direction."<sup>59</sup> The majority explained that "[w]ords such as 'plain import,' 'fair implication,' or the like reflect the need for that assurance."<sup>60</sup> Furthermore, the four dissenting Justices asserted that the presumption of prospective application should be overcome "only when the 'plain import of a later statute directly conflicts' with it,"<sup>61</sup> and concluded that there were insufficient indicia of legislative intent in the FSA to overcome the presumption.<sup>62</sup> However, the Savings Statute was only intended to prevent the courthouse doors from opening through inadvertence when Congress altered a criminal statute. If there is any evidence that Congress considered the temporal scope, the presumption of prospectivity should disappear.

## II. PRESUMPTION AGAINST RETROACTIVE LAWMAKING

There may well be plausible reasons to favor prospective application of decriminalization and sentencing reductions outside of the Savings Statute. The *Dorsey* Court's analysis is in line with judicial

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57. See, e.g., *Lovely v. United States*, 175 F.2d 312, 316–18 (4th Cir. 1949) (holding that, without express retroactivity provision, court must apply prior harsher sentencing framework); *Hurwitz v. United States*, 53 F.2d 552 (D.C. Cir. 1931); *Maceo v. United States*, 46 F.2d 788 (5th Cir. 1931).

58. See John P. MacKenzie, Comment, *Hamm v. City of Rock Hill and the Federal Savings Statute*, 54 Geo. L.J. 173, 181–82 (1965).

59. *Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012).

60. *Id.*

61. *Id.* at 2340.

62. *Id.*

pronouncements warning against retroactive application of policymaking. As a constitutional matter, the Ex Post Facto Clauses protect individuals from legislative criminalization of conduct that was lawful when committed and from enhancement of punishment for criminal conduct after that conduct was committed.<sup>63</sup> The Supreme Court has struck down a number of laws as violating the ex post facto principle.<sup>64</sup>

Although retroactive lawmaking is more prevalent in the civil context,<sup>65</sup> even in those instances there are reasons to avoid retroactivity. For example, some retroactive measures violate the Takings Clause.<sup>66</sup> In *Eastern Enterprises v. Apfel*, the Court noted that legislation may be “unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”<sup>67</sup> Further, the Supreme Court has articulated a more general presumption against reading statutes<sup>68</sup> and administrative rulemaking<sup>69</sup> to apply retroactively. Administrative adjudications have also been overturned for encroaching on settled expectations, at least in unusual circumstances.<sup>70</sup> Thus, “[r]etroactivity is generally disfavored in the law.”<sup>71</sup> This Part discusses the general presumption against retroactivity in lawmaking but rejects its relevance to the amelioration context.

The reasons for suspicions about retroactive policymaking are familiar. Commentators and courts alike long have stressed that individuals and firms should receive fair notice of penalties prior to

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63. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

64. See, e.g., *Miller v. Florida*, 482 U.S. 423 (1987) (striking down retroactive application of Florida’s revised sentencing scheme); *Weaver v. Graham*, 450 U.S. 24 (1981) (striking down application of Florida statute related to good time credits for prisoners).

65. The Court generally has permitted retroactivity in civil cases as long as the underlying congressional decision to reach back in time was reasonable. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15–16 (1976) (“[L]egislative [a]cts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality” even when upsetting “otherwise settled expectations.”).

66. E.g., *E. Enters. v. Apfel*, 524 U.S. 498 (1998); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); cf. *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (holding that retroactive enforcement of new statute would violate contract).

67. 524 U.S. at 528–29.

68. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (finding no clear congressional intent to apply a provision of the Civil Rights Act of 1991 to pending cases).

69. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988) (noting that an administrative agency can’t promulgate rules that apply retroactively unless expressly granted that power by Congress).

70. See *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081–86 (D.C. Cir. 1987) (en banc) (new principles cannot be applied in administrative adjudication if they cause unfair surprise).

71. E. Enters., 524 U.S. at 532 (citing *Bowen*, 488 U.S. at 208).

any antisocial conduct.<sup>72</sup> They can then be held accountable for the consequences of their acts. In addition to these reliance interests, rule of law concerns oppose retroactivity. Otherwise, legislatures could single out individuals for criminal or civil sanctions in reaction to contemporary outcry over unpopular actions. A prospectivity requirement forces legislatures to consider a broad range of situations before exacting penalties, which minimizes the possibility that legislators will target a limited group of disfavored individuals.<sup>73</sup> Finally, most legal systems value certainty as a way to foster stability.<sup>74</sup> Otherwise, private ordering cannot proceed as effectively in light of the pall cast by the prospect that the past legal framework might be disrupted. Although regulatory uncertainty in the future can also stymie progress, commerce depends on reliance on the rules and understandings in existence at the time of contracting or investment.

These three related fundamental concerns—honoring reliance interests, imposing rule of law constraints on legislatures, and valuing certainty—largely are absent when Congress ameliorates the severity of prior penalties or decriminalizes conduct altogether. No reliance interest of the offender is threatened since he or she has no vested interest in a longer sentence. Prosecutors arguably have considerable interest in seeing that offenders serve out their sentences, but such reliance is not legally cognizable. Governors can pardon offenders without trenching on such reliance interests, as can legislatures through early release programs.<sup>75</sup>

Society is also far less concerned about rule of law values when the Legislature lightens penalties. The concern for retroactivity in that context is not that the Legislature is singling out individuals for disadvantageous treatment but rather to confer a benefit. Members of Congress, for instance, might wish to lighten the penalty for those convicted of unlawful lobbying in order to aid prior supporters. Indeed, Congress might wish to minimize punishment for those charged with using powder as opposed to crack cocaine given that members of Congress are more likely to come into contact with

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72. See, e.g., Jan G. Laitos, *Legislative Retroactivity*, 52 J. URB. & CONTEMP. L. 81, 103–05 (1997); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 426–27 (1982); Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1340–42 (2000).

73. See, e.g., Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2158–59 (1996).

74. See Laitos, *supra* note 72, at 103–04.

75. See *infra* Part III.A.

users of that form of cocaine.<sup>76</sup> Political process constraints, however, make it less likely that problematic instances of legislative amelioration of punishment will arise. The electorate disapproves of representatives benefitting acquaintances in such fashion.<sup>77</sup> The risk of arbitrary conduct is higher when the Legislature seeks to punish prior wrongdoing as opposed to when it benefits those punished in the past.

Moreover, we value certainty in the legal system to support private ordering. Commerce depends on stability in the surrounding legal framework. Nonetheless, there is no corresponding benefit from ensuring that sentences are fully served. Executive pardons and early release statutes are inconsistent with a norm of certainty in the criminal sentencing context, yet have been upheld as constitutional.<sup>78</sup>

Thus, from the reliance, rule of law, and certainty perspectives, congressional easing of penalties for crack offenders produces no red flags. There is no breach of settled expectations, no risk that Congress can single out disfavored individuals for punishment, and little social concern that retroactive amelioration undermines certainty in the criminal justice system. The traditional skepticism about retroactivity, therefore, does not support any presumption that legislative ameliorative efforts be applied prospectively.

Finally, from the perspective of interest group theory,<sup>79</sup> there is little reason to fear inordinate pressure on Congress. Prisoners simply lack political power. Indeed, many of those previously convicted have already lost the right to vote and are among the least powerful in society. We are not particularly concerned, therefore, that legislative retroactive amelioration is attributable to lobbying. No one has accused Congress of capitulating to the crack lobby in passing the

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76. See *United States v. Clary*, 846 F. Supp. 768, 784 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994) ("The prospect of black crack migrating to the white suburbs led the legislators to reflexively punish crack violators more harshly than their white, suburban, powder cocaine dealing counterparts.").

77. Of course, Congress can always benefit constituents in the civil context by making prior investments more valuable. A classic instance is illustrated by congressional approval for constructing railroads, which typically benefited nearby property owners. *Cf.* *United States v. Miller*, 317 U.S. 369, 377 (1943) (refusing to permit compensation in condemnation proceeding for increased valuation due to siting of railroad lines). Such dynamics are not at stake when criminal penalties are made less harsh.

78. See *infra* text accompanying notes 113–17.

79. For an overview of the interest group account, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

Fair Sentencing Act. The twenty-five years of deliberations preceding the FSA<sup>80</sup> suggest the difficulty in passing amelioration measures.

Furthermore, the cost of giving prior offenders the benefits of reduced punishment is that future offenders must benefit as well. Politicians stand to gain little by appearing soft on criminals. The Willie Horton saga—triggered when the first President Bush effectively painted his opponent, Governor Michael Dukakis, as soft on crime for his early release policies—highlights the risk that politicians take by minimizing punishment of offenders.<sup>81</sup> There seems to be little political advantage in extending the benefits of reduced sentences to those previously convicted. Thus, there is little reason from an interest group perspective to view congressional decisions to benefit criminal offenders with skepticism.

### III. STRUCTURAL BARS TO RETROACTIVE AMELIORATION

Although the reasons for general skepticism of retroactivity do not apply in the context of reducing criminal sentences, separation of powers constraints may support *Dorsey*'s presumption against retroactive application. First, the Legislature's retroactive amelioration decision may impinge on the Executive's pardon power, as some state courts have held under their respective constitutions.<sup>82</sup> If the pardon power is exclusive, then the Legislature is handcuffed in attempting to extend the diminution in punishment to those previously convicted. Second, legislative retroactive amelioration may infringe on the judiciary's powers by attempting to undo a final judicial decision. Indeed, some have understood the finality principle in that vein.<sup>83</sup> Accordingly, this Section examines the structural bars to a legislative decision to decriminalize a prior offense or lessen its punishment.

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80. See Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the "Fair" Out of the Fair Sentencing Act of 2010*, 117 PENN. ST. L. REV. 503, 507–13 (2012).

81. See Anthony Lewis, *The Dirty Little Secret*, N.Y. TIMES, Oct. 20, 1988, at A27 (Horton committed rape while on furlough). Illinois Governor Quinn almost was voted out of office because of an early release plan gone awry. See *Escaping His Past*, CHICAGO TRIBUNE, June 18, 2012, at 1.16. Moreover, state judges have been voted out of office for decisions that appeared pro-defendant to the public. See, e.g., Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 312–24 (1997); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defendant Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 396 n.323 (1995).

82. See *infra* notes 87–92 and accompanying text.

83. See *infra* Part III.B.

A. *Exclusivity of the Pardon Power*

If the Executive's pardon power were exclusive, then congressional efforts to lessen prior punishment would be unavailing. Such congressional action mimics a pardon by either commuting a sentence to time served or by granting full absolution to the offender.<sup>84</sup> Indeed, some academics have argued that the Constitution must be understood to allocate powers to one branch or another—that concurrent powers should be avoided.<sup>85</sup> Although the Supreme Court has held that Congress cannot interfere with the President's exercise of the pardon power,<sup>86</sup> it has had no occasion to decide whether congressional decisions to lighten sentences retroactively violate the pardon power.

Generations ago, several state courts held that legislative efforts to reduce punishment retroactively violate the separation of powers doctrine under their state constitutions. For instance, in *Ex parte Chambers*,<sup>87</sup> the North Dakota Supreme Court invalidated a legislative action designed to set aside prior punishment for violation of Prohibition laws. The court held that the legislation violated the governor's pardon power "in so far as the [new act] attempt[ed] to extinguish the sentences to imprisonment of persons against whom judgment of convictions had been had in the trial court prior to the effective date of such act."<sup>88</sup> Application of *Chambers* to the FSA would prevent extending the benefits of reduced punishment to those previously convicted. Similarly, in *People v. LaBuy*,<sup>89</sup> the Illinois Supreme Court held that a legislative enactment authorizing trial courts to commute sentences within thirty days of sentencing violated the governor's pardon power.<sup>90</sup> In the same vein, the Mississippi Supreme Court held that a legislative act permitting a county board of supervisors to discharge infirm convicts violated the pardon power.<sup>91</sup> To those courts, the Executive's pardon power

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84. For an argument that congressional retroactive amelioration likely violates the Pardon Clause, see Note, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 146 (1972).

85. See, e.g., Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 299–30 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)). For a discussion of the Supreme Court's overall drift to a view of overlapping powers, see Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051 (2010).

86. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380–81 (1866); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1871) (finding that a law passed by Congress that limited pardon rights was unconstitutional).

87. 285 N.W. 862 (N.D. 1939).

88. *Id.* at 865.

89. 120 N.E. 537 (Ill. 1918).

90. *Id.* at 537–38.

91. *State v. Jackson*, 109 So. 724, 725–26 (Miss. 1857) (en banc).



was exclusive, and thus, legislative efforts to mitigate punishment in any form were invalid. The Office of Legal Counsel in the Department of Justice similarly opined in 1974 that the President's pardon power should be deemed exclusive.<sup>92</sup>

Nonetheless, although the Legislature's power to diminish the length of sentences no doubt overlaps with the President's pardon power, the exclusivity argument is too broad.<sup>93</sup> Both Congress and courts have long wielded a concurrent power to limit an offender's stay in prison.

First, Congress and state legislatures have passed statutes affecting the duration of a prisoner's stay in prison. Most notably, congressional passage of the federal parole statute in 1910<sup>94</sup> was applied to those previously convicted,<sup>95</sup> and a federal district court in Washington held, against the government's challenge under the Pardon Clause, that those previously convicted were entitled to its benefits.<sup>96</sup> Perhaps retroactive application there can be rationalized on the ground that parole generally remains within the authority of the executive branch.<sup>97</sup> Not so, however, with probation. Congress applied its probation statute in 1925 retroactively.<sup>98</sup> The Ninth Circuit in *Nix v. James*<sup>99</sup> held against the government and permitted an offender, sentenced before the Probation Act was enacted, to receive the benefit of probation.<sup>100</sup> The court explained that "[i]t is generally held that Probation Acts do not encroach on the prerogatives of the Executive under the pardoning power."<sup>101</sup>

The Supreme Court in *Brown v. Walker*<sup>102</sup> upheld a statute granting immunity to individuals cooperating with a congressional

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92. In responding to a congressional bill to permit draft dodgers immunity, OLC stated that the provision "constitutes an obvious usurpation of the pardoning power and renders the bill constitutionally infirm." Letter from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, to the Honorable James D. Eastland (Feb. 25, 1974), *quoted in* Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1269 (2003).

93. See Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383 (2006).

94. Act of June 25, 1910, ch. 387, 36 Stat. 819.

95. *Id.*; see also *Anderson v. Corall*, 263 U.S. 193 (1923).

96. *Thompson v. Duehay*, 217 F. 484, 486–87 (W.D. Wash, 1914), *aff'd*, 223 F. 305 (9th Cir. 1915).

97. See, e.g., *United States v. Fryar*, 920 F.2d 252, 256 (5th Cir. 1990) (noting that the executive branch has plenary authority over parole revocation).

98. Federal Probation Act of 1925, ch. 521, 43 Stat. 1259 (1925).

99. 7 F.2d 590 (9th Cir. 1925).

100. *Id.* at 592–93.

101. *Id.* at 594.

102. 161 U.S. 591 (1896).

investigation into the newly formed Interstate Commerce Commission.<sup>103</sup> As applied to witnesses who had already committed unlawful acts, the legislation in essence granted a pardon contingent on their cooperation. A witness defended his refusal to testify in part on the ground that the legislation violated the Pardon Clause because it removed the penalty for prior acts contingent on cooperation.<sup>104</sup> The Court disagreed, first noting that “[t]he act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England or in this country.”<sup>105</sup> The Court continued that the President’s pardon “power has never been held to take from Congress the power to pass acts of general amnesty.”<sup>106</sup>

The Supreme Court also has approved congressional acts empowering the Executive to remit civil fines meted by courts. For instance, in *The Laura*,<sup>107</sup> the Court upheld Congress’s power to authorize the Secretary of the Treasury to remit fines that had been awarded by a court against steamship owners who had violated federal laws setting occupancy limits for passengers.<sup>108</sup> The Court rejected the argument that the congressional measure was “in conflict with the clause of the Constitution investing the President with power ‘to grant reprieves and pardons for all offences against the United States. . . .’”<sup>109</sup> To the Court, the presidential pardon power was not exclusive.<sup>110</sup> As the Court stressed earlier in *Maryland v. Baltimore & Ohio Railroad Co.*,<sup>111</sup> “Congress had clearly the power to authorize the [S]ecretary of the Treasury to remit any penalty or forfeiture incurred . . . either before or after judgment.”<sup>112</sup> Indeed, Congress first passed a measure authorizing remission of fines in 1790.<sup>113</sup>

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103. *Id.* at 609–10.

104. *See id.*

105. *Id.* at 601 (citation omitted).

106. *Id.* In dissent, Justice Field asserted that “[t]he legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon, by whatever name the act may be termed. And a pardon is an act of grace which is, so far as related to offenders against the United States, the sole prerogative of the President to grant.” *Id.* at 638 (Field, J., dissenting).

107. 114 U.S. 411 (1885).

108. Act of Feb. 28, 1871, § 5294, 1 Rev. Stat. 1028; *The Laura*, 114 U.S. at 414–16.

109. *The Laura*, 114 U.S. at 413.

110. *Id.* at 414–16.

111. 44 U.S. 534 (1845).

112. *Id.* at 552.

113. Act of May 26, 1790, ch. 12, 1 Stat. 122; *see also* Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209 (authorizing remission of statutory penalties for failure to pay liquor tax).

More recently, a number of state legislatures have passed early release statutes in the face of prison overcrowding. Those statutes have withstood attacks based on gubernatorial pardon powers. For instance, the Michigan Legislature responded to a financial crisis by passing the Prison Overcrowding Emergency Powers Act.<sup>114</sup> In *Oakland County Prosecuting Attorney v. Michigan Department of Corrections*,<sup>115</sup> the Michigan Supreme Court reversed the appellate court and upheld the statute against a challenge that the Legislature had undermined the Executive's pardon power.<sup>116</sup> The Court noted that:

[a]lthough the retroactive reduction of minimum sentences because of prison overcrowding has consequences similar to commutation, it derives from a wholly separate constitutional grant of power. . . . Further, the Legislature has done nothing to directly interfere with the Governor's function; he remains free to pardon or commute the sentences of individual prisoners as he, in his discretion, feels the circumstances warrant.<sup>117</sup>

Second, understanding the President's pardon authority as exclusive would undermine our tradition recognizing that Congress can change a criminal provision or penalty and thereby halt a pending prosecution. No one disputes that Congress can diminish penalties for those offenders whose cases are pending, as in *Dorsey*. Yet, the presidential pardon power also plainly covers individuals who have not yet been convicted<sup>118</sup>—President Carter issued an

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114. 1980 Mich. Pubs. Act 519 (repealed 1987).

115. 305 N.W.2d 515 (Mich. 1981).

116. *Id.* at 519–21.

117. *Id.* at 520–21. *See also* *People v. Matelic*, 641 N.W.2d 252, 264–66 (Mich. 2001) (upholding statute providing for early release of prisoners who cooperated with law enforcement). In *Lynce v. Mathis*, 519 U.S. 433 (1997), the U.S. Supreme Court considered Florida's early release statute that authorized early release credits to prisoners when the population of the state prison system exceeded prescribed levels. *Id.* at 435. The Act was couched in mandatory terms—the Legislature decreased punishment for the administrative purpose of alleviating the burden on the overly strapped prison system. *Id.* at 437–38. The case only rose to the Supreme Court in light of Florida's decision to cancel certain early release provisions, which the Court concluded violated the Ex Post Facto Clause. *Id.* at 446–47. The Florida courts themselves had never held that the early release statutes violated the Executive's pardon authority. As with federal statutes, state legislatures have dictated early release, and such efforts have not been thought to violate the Executive's pardon authority.

118. *See Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.”).

amnesty to draft evaders,<sup>119</sup> President Ford pardoned President Nixon,<sup>120</sup> the first President Bush pardoned George Steinbrenner before trial,<sup>121</sup> and President Clinton pardoned George Prosperi in advance of conviction.<sup>122</sup>

In the United States, legislatures enjoy the power to direct that pending prosecutions be dropped or decided under new rules.<sup>123</sup> In *United States v. Tynen*,<sup>124</sup> as discussed above, the Court held that even modification of criminal statutes required abating all prosecutions under the old statute: “[b]y the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell.”<sup>125</sup> The very need for a federal savings statute in that same era derived from the common law rule that repeal of a criminal statute required abatement of all criminal proceedings under the old statute.<sup>126</sup>

*Tynen* strongly supports the conclusion that the President’s pardon power is not exclusive. Otherwise, Congress could not direct that pending prosecutions be halted even when decriminalizing a statute. If congressional action paralleling pardons of individuals before conviction does not violate the President’s pardon authority, it is difficult to understand why congressional action after sentencing would be unconstitutional.

Third, courts themselves arguably have disrupted the Executive’s pardon authority when finding that the offender either was convicted under a statute subsequently found unconstitutional or convicted under rules of criminal procedure that undermined the integrity of the judgment. The Supreme Court in *Ex parte Siebold*<sup>127</sup> directed that a conviction pursuant to an unconstitutional statute should be considered null: “A conviction under [such a law] is not merely erroneous, but is illegal and void, and cannot be a legal

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119. Proclamation No. 4483, 3 C.F.R. 4 (1977); see generally PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT (1975).

120. See *Murphy v. Ford*, 390 F. Supp. 1372, 1374–75 (W.D. Mich. 1975) (declining to review Ford’s pardon of Nixon).

121. See Julie Johnson, *Steinbrenner Pardoned by Reagan for ’72 Election Law Violation*, N.Y. TIMES, Jan. 20, 1989.

122. See Leon Fooksman, *Embezzler Gets House Arrest*, SOUTH FLORIDA SUN-SENTINEL, March 3, 2001, at 1B.

123. The same evidently is true in England. See Comment, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 125–26 (1972) (discussing how the abatement doctrine is similarly applied in England).

124. 78 U.S. (11 Wall.) 88 (1870).

125. *Id.* at 95; see *supra* note 55.

126. See 1 U.S.C. 109 (2006) (“The repeal of any statute shall not have the effect to release or extinguish any penalty . . . unless the repealing Act shall so expressly provide . . .”).

127. 100 U.S. 371 (1879).

cause of imprisonment.”<sup>128</sup> Similarly, after holding in *Ford v. Wainwright*<sup>129</sup> that the Eighth Amendment barred execution of prisoners who are insane,<sup>130</sup> it would have been extraordinary to permit such executions for those who had been previously sentenced. Also, upon holding that laws criminalizing interracial marriage were unconstitutional in *Loving v. Virginia*,<sup>131</sup> the Supreme Court would not have tolerated continued incarceration for those in prison for that very offense. Such exercise of judicial discretion has never been thought to violate the President’s pardon power. As Justice Brennan commented in concurrence in *United States v. United States Coin & Currency*,<sup>132</sup> “a decision holding certain conduct beyond the power of government to sanction or prohibit must be applied to prevent the continuing imposition of sanctions for conduct engaged in before the date of that decision.”<sup>133</sup>

In summary, the President’s pardon power is not exclusive, leaving room for Congress to grant amnesties and pass early release statutes. Congress, in other words, can limit punishment for offenses retroactively without violating the pardon power.

Congress, however, may lack the power to ameliorate the sentence of a particular offender, as opposed to a class of offenders. Congressional power to reduce punishment likely is linked to its authority to create penalties in the first instance. While Congress unquestionably enjoys the power to enact private bills to benefit individuals who were injured or who otherwise are deportable,<sup>134</sup> Congress’s authority to show mercy on particular criminal offenders is less clear. Although the Supreme Court has not addressed Congress’s power to lessen punishment for particular offenders, it has discussed the converse situation of congressional decisions to single out individuals for adverse treatment. In invalidating on Bill of Attainder grounds a provision of the Labor-Management Reporting and Disclosure Act,<sup>135</sup> which precluded Communists from holding most jobs within labor unions,<sup>136</sup> the Court in *United States v. Brown*<sup>137</sup> reasoned that courts, as opposed to legislatures, are to

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128. *Id.* at 376–77; see also *Bond v. United States*, 131 S. Ct. 2355, 2363–65 (2011) (reaffirming that offender has standing to challenge constitutionality of criminal law on any ground).

129. 477 U.S. 399 (1986).

130. *Id.* at 409–10.

131. 388 U.S. 1 (1967).

132. 401 U.S. 715 (1971).

133. *Id.* at 726–27 (Brennan, J., concurring).

134. See generally Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

135. Pub. L. No. 86-257, 73 Stat. 519 (1959).

136. § 504, 73 Stat. at 536–37.

137. 381 U.S. 437 (1965).

make case-by-case determinations of blameworthiness.<sup>138</sup> Congress's power to criminalize conduct and set appropriate penalties may encompass changing penalties for particular crimes retroactively but may not allow for adjustment of particular prisoners' sentences.<sup>139</sup> The Framers warned of congressional meddling in specific judicial cases.<sup>140</sup>

Yet, to the extent that the President's pardon power is exclusive upon a request from a particular individual, the fact remains that congressional discretion to lessen the sentences of all those convicted of a particular offense is constitutionally unproblematic. A congressional decision to make the FSA fully retroactive, therefore, would not have violated the President's pardon power.

### B. Interference with Final Decisions

Even if legislative efforts to mitigate punishment comport with the President's pardon power, they may nonetheless run afoul of the judiciary's power by undoing a final judgment. Indeed, perhaps the concern underlying the state court decisions that have blocked such legislative efforts<sup>141</sup> rests on the danger of permitting legislatures to invade the province of the Judiciary rather than the Executive.

In *Plaut v. Spendthrift Farm*,<sup>142</sup> the question raised was whether Congress could retroactively extend the statute of limitations for a securities action that had been dismissed as time barred.<sup>143</sup> The Supreme Court held that Congress lacks the power to nullify a final judgment: "We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so."<sup>144</sup> The Court reasoned that "[h]aving achieved finality, however, a judicial decision becomes the last word of the judicial

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138. See *id.* at 445.

139. The California court in *In re Kemp*, 192 Cal. App. 4th 252 (Cal. Ct. App. 2011), reached the same conclusion under the California Constitution using slightly different reasoning. The key to the court was whether the ameliorative legislation sought to "commute existing sentences as an act of grace" or rather "to bring them in line with sentences under the new law, in furtherance of the . . . principal objective of making punishments uniform." *Id.* at 263.

140. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395–97 (1798) (opinion of Paterson, J.).

141. See *supra* text accompanying notes 87–92.

142. 514 U.S. 211 (1995).

143. *Id.* at 213–15.

144. *Id.* at 240.

department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to the very case* was something other than what the courts said it was.”<sup>145</sup> Justice Scalia for the Court stressed that the constitutional ill could not be remedied even if Congress changed the law for a class of cases as opposed to an individual case.<sup>146</sup> When responding to Justice Breyer’s concurring opinion focusing on the protections of general lawmaking, Justice Scalia asserted, “[t]he nub of that infringement consists *not* of the Legislature’s acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature’s nullifying prior, authoritative judicial action.”<sup>147</sup>

*Plaut* may explain why Congress typically has not chosen to benefit those offenders who have already been sentenced, even when decriminalizing an action.<sup>148</sup> Congress’s reticence, however, should not be taken for a constitutional rule. Properly understood, a congressional decision to open the jailhouse doors does not disturb the finality of a judgment but rather modifies the prior ruling’s continuing impact. Congress’s decision to make the 1925 Probation Act fully retroactive provides a leading example.<sup>149</sup>

As noted previously, Congress long has authorized the executive branch to remit fines for particular offenses even after a final decision. Congress extended that authorization to “fines, penalties, and forfeitures” and did not limit relief to before final judgment.<sup>150</sup> As *The Laura* evidences, the Executive has lowered penalties through means other than the pardon power at the direction of Congress. Legislation modifying relief therefore also does not undermine the sanctity of a final judgment.

Moreover, in *Pennsylvania v. Wheeling and Belmont Bridge Co.*,<sup>151</sup> the Supreme Court considered whether Congress violated the separation of powers doctrine by interfering with a final judgment previously entered in a commerce case. The Court previously held that a bridge over the Ohio River obstructed navigation of the river

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145. *Id.* at 227 (emphasis in original).

146. *Id.* (“To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless.”).

147. *Id.* at 239 (emphasis in original) (footnote omitted).

148. *See also* *Commonwealth v. Sutley*, 378 A.2d 780, 782–84 (Pa. 1977) (holding that the legislative effort to diminish sentences retroactively unconstitutionally infringed on judicial power by disturbing a final decision).

149. *See supra* text accompanying notes 98–101.

150. In *The Laura*, the remission occurred prior to final judgment. *See supra* text accompanying notes 109–11.

151. 59 U.S. (18 How.) 421 (1856).

and had ordered that the bridge be removed.<sup>152</sup> Congress responded by enacting legislation declaring the bridge to be a lawful structure and enlisting the bridge “for the passage of the mails of the United States.”<sup>153</sup> The Court upheld the legislation, reasoning in pertinent part that Congress enjoys the power to alter the prospective effect of a judicial decision.<sup>154</sup>

To be sure, decisions in *The Laura* and *Wheeling* preceded *Plaut* by generations. After *Plaut*, the Supreme Court in *Miller v. French*<sup>155</sup> stressed the continuing vitality of *Wheeling*. *Miller* addressed a provision in the Prison Litigation Reform Act of 1995 (PLRA),<sup>156</sup> specifying that a motion to terminate prospective relief in a prison conditions case “shall operate as a stay” of that relief until the court resolves the motion.<sup>157</sup> The PLRA thus eliminated the court’s discretion to continue a prior injunction, at least for a certain time period. The Court explained that “[a]lthough the remedial injunction here is a ‘final judgment’ for purposes of appeal,”<sup>158</sup> the automatic stay did not intrude into the province of the courts: “Congress’ imposition of a time limit . . . does not in itself offend the structural concerns underlying the Constitution’s separation of powers.”<sup>159</sup>

Similarly, in *Cobell v. Norton*<sup>160</sup> the D.C. Circuit considered the government’s appeal from an injunction requiring it to formulate a plan to remedy problems plaguing management of Individual Indian Management accounts, including a requirement to undertake an accounting of past payments. Congress, several months after the district court injunction, passed a law providing the government temporary immunity from conducting a historical accounting.<sup>161</sup> The appellate court distinguished *Plaut* on the ground that, as in *Wheeling*, continuing relief is subject to legislative oversight.<sup>162</sup>

Altering the duration of the time that an offender stays in prison presents a close analogy to the legislative adjustments upheld in

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152. *Id.* at 429.

153. *Id.*

154. *See id.* at 436.

155. 530 U.S. 327 (2000).

156. Pub. L. No. 104-134, 110 Stat. 1321-66.

157. § 3626(e)(2), 110 Stat. at 1321-68 to 1321-69; 530 U.S. at 333-34.

158. 530 U.S. at 347 (quoting *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995)).

159. *Id.* at 349. To be sure, early release statutes, unlike the stay in *Miller*, permanently alter the litigants’ rights. Nonetheless, in both contexts, Congress has limited the prospective operation of a final judicial decision.

160. 392 F.3d 461 (D.C. Cir. 2004).

161. Pub. L. No. 108-108, 117 Stat. 1241, 1263 (2003); *Cobell*, 392 F.3d at 465-66.

162. *See* 392 F.3d at 467. *See also* *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1667-68 (10th Cir. 2004) (following *Wheeling* by permitting congressional measure to supersede settlement agreement addressing logging rights).



*Miller and Cobell*. Conditions have changed, as in the PLRA example, warranting early release. Legislative reduction of punishment does not undermine the finality of the trial court's sentencing decision any more than altering the stay of a trial court's injunction.<sup>163</sup> Even when Congress diminishes punishment, the fact of conviction remains on the books, as do collateral consequences such as deprivation of the right to vote or inability to hold particular government offices.<sup>164</sup> All that has changed is the time the individual is required to stay behind bars.

Viewed another way, Congress always can interfere with the impact of a final decision. If a court holds that sovereign immunity bars a suit or that an individual is deportable, Congress cannot change the decision, but it can pass a private bill awarding money or blocking the deportation. Moreover, it has done so on numerous occasions.<sup>165</sup> Through the private bill mechanism, therefore, Congress can adjust the continuing relevance of a court decision, as it did by passing new legislation in *Wheeling*.<sup>166</sup>

A congressional directive to release prisoners before expiration of their sentences is no different. Congress has altered the consequences of the judicial decision, but not the decision itself. Operation of the parole system works in similar vein. A court's judgment as to conviction is final, the court sets the framework for punishment, but the actual time behind bars is determined by parole authorities subject to legislative determinants.<sup>167</sup>

This is not to suggest that Congress can order particular offenders released as opposed to a class of offenders.<sup>168</sup> Justice Breyer clearly signaled in *Plaut* his view of the risks of Congress singling out particular individuals for favored treatment.<sup>169</sup> Private bills have

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163. State courts have rejected challenges to early release programs based on alleged violation of judicial finality. *See, e.g.,* *Fields v. Driesel*, 941 P.2d 1000, 1002–05 (Okla. Crim. App. 1997) (reversing sentencing court that had issued an order requiring the director of the prison system to comply with prior sentence meted out or show cause why he should not be in contempt for infringing finality of court order); *State v. Stenklyft*, 697 N.W.2d 769, 786 (Wis. 2005) (recognizing legislative role in fashioning early release provision: “The ability to obtain early release under the system of parole existed solely as a matter of legislative grace. . . .”).

164. *See generally* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003); Andrea Steinacker, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801 (2003).

165. *See supra* note 136.

166. *See supra* text accompanying notes 152–54.

167. *See supra* notes 92–95 and accompanying text.

168. Although the Legislature's power to affect punishment is longstanding, there is some historical support for legislative issuance of pardons in individual cases. *See, e.g.,* *Perkins v. United States*, 99 F.2d 255 (3d Cir. 1938); *United States v. Hall*, 53 F. 352 (W.D. Pa. 1892).

169. *See supra* text accompanying note 149.

not historically been used in the criminal context—nor should they be. Congressional power to disrupt final decisions stems from the power to change punishment for the entire class of crimes.<sup>170</sup>

In sum, the presidential pardon power and *Plaut* do not present persuasive reasons to favor prospective application of congressional statutes. The issue is one of legislative policy, namely whether the interest in treating similarly situated offenders similarly outweighs the interest in finality. There were no constitutional obstacles preventing Congress from benefiting those previously convicted of trafficking crack.

#### IV. ADDITIONAL POLICY IMPLICATIONS OF CONGRESSIONAL AMELIORATION OF PUNISHMENT

Given the absence of structural impediments to retroactive application of a legislative decision to ameliorate punishment, it is up to Congress to determine the temporal scope of any such efforts. Congress in the FSA could have decided to benefit those previously sentenced for crack infractions if it chose, much as Congress in 1925 retroactively applied the new Probation Act.<sup>171</sup> To the extent that the one hundred-to-one ratio in punishment between crack and powdered cocaine offenses was untenable, notions of fairness strongly counsel for retroactive application. Why retain disproportionate punishment when Congress determined that it had previously erred in prescribing such draconian punishment? Indeed, it would be hard to explain to a client sentenced to twenty years for dealing in crack why someone convicted of the very same crime can be released over fifteen years earlier merely because the second person's sentencing became final after Congress mitigated punishment in 2010. For crack offenses, Congress could have, and perhaps should have, applied the FSA retroactively.

Recently, Professor S. David Mitchell has argued that Congress has no rational reason to distinguish between those whose sentences were finalized on the day that the congressional amelioration decision went into effect from those whose sentences were

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170. In other words, Congress can alter punishment for a class of offenders without violating either *Plaut* or the pardon power. In the criminal context, at least, Justice Breyer's analysis in *Plaut* is critical. Congress's power to affect a final judicial decision turns on its Article I power to set penalties for a crime.

171. See *supra* text accompanying notes 98–101.

not finalized.<sup>172</sup> Accordingly, Mitchell asserts that neither consequentialist nor retributivist theories of punishment support continuing punishment for those whose actions subsequently are decriminalized or punished less severely.<sup>173</sup>

Consider California's recent decision in *In re Kemp*.<sup>174</sup> There, the appellate court considered the habeas challenge of a nonviolent offender who claimed that he was entitled to the retroactive benefit of administrative credits provided by the California Legislature *after* he was sentenced.<sup>175</sup> He argued not that the Legislature intended to benefit offenders whose judgments had become final, but that the Equal Protection Clause required that the benefits be extended to him.<sup>176</sup>

In finding no rational basis to support the Legislature's decision to decline retroactive application of the new measure, the court started from the premise that the Legislature's only goal was to save the expense of incarceration for similarly situated offenders:

Since the purpose of [the legislation] is solely economic, the only reasonably conceivable justification for treating the two subgroups differently for equal protection analysis would be if one group were more dangerous than the other. . . . However, since the entire group of eligible prisoners consists of those prisoners deemed safe for early release based upon the offense or offenses they have committed, neither subgroup is more dangerous than the other.<sup>177</sup>

The court concluded that, as a matter of equal protection, the legislation could not satisfy the rational basis test.<sup>178</sup>

The *Kemp* court went on to consider whether the Legislature's independent concern in preserving finality could, by itself, satisfy the rational basis test. In tension with the suppositions of *Dorsey*, the court asserted that "[c]ertainly, the date of finality of judgment bears no rational basis for making such a distinction."<sup>179</sup> The separation of powers concern could not meet the equal protection

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172. See Mitchell, *supra* note 26, 14–17. For a similar view expressed by a jurisprudential legend, see Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 *Hastings L.J.* 771, 790 n.54 (1999).

173. Mitchell, *supra* note 26, at 14–17.

174. 192 Cal. App. 4th 252 (Cal Ct. App. 2011).

175. S.B. 18, 3d Ex. Sess. 2009–2010, ch. 28, § 50 (Cal. 2009).

176. *Kemp*, 192 Cal. App. 4th at 257.

177. *Id.* at 261.

178. *Id.*

179. *Id.*

burden of justifying a distinction between the two groups of offenders based on their conduct or status.<sup>180</sup> Therefore, the administrative credit benefit had to be applied retroactively.

From a deterrence perspective, *In re Kemp* is on solid ground. Little can be gained by maintaining the prior punishment scheme after the Legislature decriminalizes an offense or changes a legislative classification. The deterrence objective will not be thwarted if offenders know that they will benefit should the Legislature later decriminalize the offensive conduct or lessen the punishment. The prospect is far too remote. Furthermore, from the perspective of specific deterrence, there is no need to continue punishment if the offense is decriminalized or the punishment exceeds the cap now placed by the Legislature. As in the crack example, Congress has set the term of imprisonment that is appropriate to deter all future offenders. Relatedly, there is little need for extended rehabilitation when the Legislature has stated that, henceforth, the underlying conduct should not be punished as severely or at all.<sup>181</sup> For example, if state legislatures now believe that marijuana possession should not be punished, there is no need to rehabilitate those who previously had been convicted of possession.

Thus, from a deterrence vantage point, a congressional decision to keep an offender in jail past a term of imprisonment that subsequent offenders must serve is, as *In re Kemp* held, invalid under the rational basis test. Congress must have at least some plausible objective in holding offenders committing the same offense to different jail terms. A legislative decision that every offender whose last name started with an A, E, I, O or U must continue to serve time would violate the Equal Protection Clause.

From a retributivist perspective,<sup>182</sup> however, Professor Mitchell's argument falters in at least three contexts. Moreover, institutional concerns present a fourth setting that, at times, can legitimate decisions to extend benefits prospectively only.

1. As an initial matter, consider what some have termed "legalistic" retribution, which is retribution arising because an offender knowingly transgresses a rule of the community.<sup>183</sup> The fact that

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180. *Id.* at 262–63. *Kemp* is not an aberration. In *In re Kapperman*, 522 P.2d 657 (Cal. 1974), a prisoner contended that he should benefit from a prospective change in computation of certain good time credits. The court agreed that there was no rational basis to deny him and those similarly situated the benefit of the computational change. *Id.* at 662.

181. Mitchell, *supra* note 26, at 14–16.

182. Professor Mitchell argues that "an ameliorative change represents a legislative acknowledgement, and by proxy a societal acknowledgement as well, that the prior penalty was disproportionate to the conduct." *Id.* at 16.

183. Russell L. Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 885–86 (2002).

norms later change in no way undermines the conclusion that the individual knowingly (depending on the mens rea required) violated a rule of the community. At least in the context of decriminalization, Congress rationally could treat those who knowingly violated a social command differently from those who did not, even though the conduct was the same.

Take a simple example. Suppose that a person has been convicted of reckless driving after being clocked at seventy miles per hour in a fifty-five mile per hour zone on a highway. The jurisdiction later changes the law to permit seventy miles per hour on that stretch of highway. Should the offender's punishment be lessened? Even though the community no longer views the prior speed as wrongful, that person chose to travel that speed knowing that the community at the earlier time regarded fifty-five miles per hour as the appropriate speed. Why should not the person suffer just deserts for willfully or recklessly violating the social order? Indeed, the person's behavior may have been designed to gain some kind of advantage over fellow citizens, such as arriving at a destination prior to others.<sup>184</sup> At times, laws prevent one individual from gaining an unfair advantage over others.<sup>185</sup>

Granted, it would be difficult to assess how much punishment is appropriate for intentional violations of such laws, but surely some punishment is warranted for knowingly violating a social command. In essence, part of each sentence is attributable to the blameworthiness of the underlying act and part due to the willingness to violate a social command. Congress, therefore, even in the case of decriminalization, rationally may decide to let some punishment be served by prior offenders.

The legalistic retribution argument, however, does not fully justify congressional refusal to extend the benefit to all offenders when diminishing punishment. It is difficult to know how much of the original prison term for offenders sentenced prior to the legislative change is attributable to the willing violation of the social order. From a retributivist perspective, therefore, the offenders who were sentenced before that change already may have been punished sufficiently, even if their original sentences are cut short.

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184. Alternatively, the violation of the law might have prompted others to reconsider their own law-abiding ways, even if the offender did not cause danger on the highways.

185. Consider repeal of an anti-gouging statute. Even if a legislature decides to decriminalize raising prices of commodities during an emergency, those who previously were convicted of the offense attempted, by raising prices, to benefit at the expense of competitors as well as consumers. A similar dynamic would arise from decriminalization of particular antitrust laws. *See also* HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 (1976).

2. Even in the case of diminution of punishment, there may be additional reasons from a retributive perspective to differentiate punishment for those who commit crimes before and after legislative amelioration. Professor Mitchell views retribution from a static perspective: any contemporary decision to reduce punishment is tantamount to a determination that the original punishment was mistaken.<sup>186</sup> Yet, the same antisocial conduct may “merit” different punishment—whether more<sup>187</sup> or less—in the Legislature’s eyes because of changed factual circumstances as opposed to morality. The appropriateness of particular punishment or, indeed, whether to punish at all, ebbs and flows with societal changes that may not be directly linked to the underlying conduct at stake.<sup>188</sup>

For instance, it may be one thing to conspire to ship unlicensed liquor over state lines now and quite another thing to have committed the same conduct during Prohibition. Congress may have lowered the punishment for interstate shipment of unlicensed liquor after Prohibition, but that does not suggest that a predecessor Congress somehow erred in ascribing a more serious penalty during Prohibition.<sup>189</sup> Similarly, consider someone convicted of importing marijuana into the United States before the recent decriminalization of marijuana in Washington and Colorado. As in the Prohibition context, the social opprobrium we place on such conduct may be less now than before, but that does not mean that we should ease the punishment for conduct when there was no legal use for marijuana at the time of the offense. In the speeding example itself, the Legislature likely raised the speed limit because of safer roads and cars, which would not excuse speeding in an era in which such speeds were riskier. Blanket retroactive amelioration ignores that diminished legislative punishment or decriminalization may take into account factual or legal circumstances that were not in effect at the time the crime was committed.<sup>190</sup>

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186. See Mitchell, *supra* note 26, at 16–17; see also *supra* note 174.

187. Of course, legislative decisions to impose greater punishment retroactively are barred by the Ex Post Facto Clauses.

188. I am not arguing that we should block retroactive amelioration to defer to the morality of prior legislatures but rather that some crimes are now considered socially less blameworthy because of changed factual circumstances and not merely because of changed morality *per se*.

189. Cf. *Hurwitz v. United States*, 53 F.2d 552 (D.C. Cir. 1931) (maintaining punishment for illegal transport of liquor after Prohibition); *Maceo v. United States*, 46 F.2d 788 (5th Cir. 1931) (same).

190. The dynamic can be reversed. Changes in larger society often make conduct worse in retrospect than at the time the conduct took place. Theft of large amounts of fertilizer became more threatening only when the potential for its use in homemade explosives became understood, and the same is true for the unlicensed importation of pseudoephedrine (e.g., Sudafed), which over time has become a critical ingredient of crystal meth.

Admittedly, no changed circumstances likely precipitated the FSA. Presumably, a more realistic understanding of crack's addictive qualities prompted the congressional decision to reduce penalties, not a change in the surrounding factual or legal circumstances.<sup>191</sup> Decriminalization for possession of liquor after Prohibition, possession of marijuana in select states, and lessened penalties for trafficking crack all stem from evolving views of blameworthiness, which offer no justification for punishing prior offenders more harshly.

3. Nonetheless, even when there are no changed circumstances, Congress, consistent with retributive goals, may decline to benefit those whose sentences had been finalized. Congress might respect the finality line in such contexts due to the plea bargaining that underlies most sentencing today. A sentence of ten years for trafficking crack may reflect the prosecution's assessment of blameworthiness based on a welter of offenses, including trafficking in other banned substances, possession, assault, and so forth.

Retroactive diminution of punishment may unravel the bargain. The prosecution may have dropped other charges in contemplation of the significant sentence doled out for the crack offense. Had the potential penalties for the crack offense been less, the plea bargaining may have resulted in the same sentence due to the presence of other charges. Offenders could retort that they would have bargained for a lesser sentence had they known of the diminished potential penalty for trafficking crack. Even if the plea bargaining would have resulted in a lower sentence, however, the level of reduction would be impossible to predict after the fact. In light of the prevalence of plea bargaining, Congress might decide that it is too difficult to rescramble the egg and thus leave finalized sentences untouched.<sup>192</sup> A congressional reluctance to disturb prior sentences, therefore, may be rooted in retribution and satisfy the equal protection principle.<sup>193</sup> That is arguably why Congress's general decision to apply sentencing changes based on when the

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191. See *Dorsey v. United States*, 132 S. Ct. 2321, 2328–29 (2012) (describing context for Congress's decision to lower the penalties); Hyser, *supra* note 80, 509–13; Tyler B. Parks, Note, *The Unfairness of the Fair Sentencing Act of 2010*, 42 U. MEM. L. REV. 1105, 1107–08, 1114, 1116–17 (2012).

192. Cf. *United States v. Douglas*, 644 F.3d 39, 45 (1st Cir. 2011) (noting that if Congress intended retroactive application, “it may well be arguable that—where the earlier and higher penalty was part of the bargain—the government may . . . be entitled to withdraw from the plea agreement if the bargain is now frustrated by the change in penalties”).

193. In contrast, the court in *In re Kemp* was not presented with a situation in which plea bargaining was pivotal since only gain time provisions were at stake.

sentencing occurs as opposed to when the unlawful act occurs is plausible.<sup>194</sup>

4. Finally, legislatures may reduce the penalties for particular crimes, not because of changed circumstances or views of the wrongfulness of the underlying conduct, but for instrumental reasons due to the rising cost of incarceration or the social costs of incarcerating too many young men. Such decisions to ameliorate punishment do not necessarily lead to the conclusion that those previously convicted also should have their punishments reduced. A rational legislature could conclude that the social or other benefits of the lightened punishment are more important with respect to those sentenced in the future than those sentenced in the past. For instance, if the goal is minimizing incarceration of young offenders, then there is more reason to limit future incarceration than to open the jailhouse doors for those sentenced under the prior regime. Or, it may be that those previously convicted and spending time in jail may benefit less from innovative alternative punishment schemes. In the FSA context, one judge noted the potential social impact from releasing so many convicted felons at once: “Understandably, Congress might not have wanted a large volume of previously sentenced offenders to be released from prison immediately.”<sup>195</sup> Such instrumental objectives should satisfy the Equal Protection Clause, even though they are not linked to the conduct criminalized.

Thus, Congress at times may intend that the mitigated punishment or decriminalization be applied prospectively only. Congress can vary punishment based on the timing of an offense because offenders are not similarly situated when the offenses occur before a new statute goes into effect. In short, Congress readily may satisfy equal protection concerns in withholding full retroactive effect from an amelioration decision. Although Congress did not articulate its justification for choosing the finality line in the FSA, a reluctance to unravel plea agreements—among other rationales—plainly would satisfy a rational basis test.

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194. As the Ninth Circuit held in *Jones v. Cupp*, 452 F.2d 1091 (9th Cir. 1971), “[t]here is nothing unconstitutional in a legislature’s conferring a benefit on prisoners only prospectively.” *Id.* at 1093 (quoting *Comerford v. Commonwealth*, 233 F.2d 294, 295 (1st Cir. 1956)). *In re Kemp* reminds us, however, that some rational reason must be inferred. See *supra* notes 177–80 and accompanying text.

195. *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *aff’d*, 644 F.3d 39 (1st Cir. 2011).



V. STATUTORY PRESUMPTION AND *DORSEY*

Constitutional concerns should not shape statutory interpretation of congressional line drawing when ameliorating punishment. Neither the pardon power nor *Plaut* precludes retroactive application of such decisions, just as the Equal Protection Clause does not compel it. Given the wide array of objectives that may lead Congress to decriminalize conduct or mitigate punishment, conventional statutory interpretation tools should be deployed once there is some evidence of congressional consideration of temporal scope.

Application of statutory interpretation rules to *Dorsey* should have been straightforward. Congress plainly considered the retroactivity issue in the FSA. In Section 8 of the FSA, Congress directed the Sentencing Commission to conform the Guidelines to the statutory changes “as soon as practicable”<sup>196</sup> and to fashion emergency guidelines to that end.<sup>197</sup> Congress directed that the Commission amend the Guidelines within ninety days of the enactment<sup>198</sup> and report on administration of the FSA within five years.<sup>199</sup> The entire thrust of the new statute was to end the “disproportionally harsh sanctions” for crack cocaine that had prevailed for twenty years.<sup>200</sup> The Court stressed that it would be contrary to congressional will to perpetuate the stricter sentencing scheme more than necessary.<sup>201</sup> Indeed, Congress at one point had rejected an amendment that would have confined the change to conduct occurring after passage of the FSA.<sup>202</sup>

Moreover, the FSA largely should be viewed in the context of the Sentencing Reform Act of 1984,<sup>203</sup> which the FSA amended. Under that framework, courts are to consult the Sentencing Guidelines “in effect on the date the defendant is sentenced,”<sup>204</sup> barring any ex post facto issues. The question of when the conduct occurs is not relevant.<sup>205</sup> As the Court stated, “consistency with ‘other guideline

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196. Fair Sentencing Act of 2010, Pub. L. No. 111–220, § 8, 124 Stat. 2372, 2374.

197. *Id.*; see also *Dorsey v. United States*, 132 S. Ct. 2321, 2329 (2012).

198. § 8, 124 Stat. at 2374.

199. § 10, 124 Stat. at 2375. The report could not be comprehensive if the FSA were to apply prospectively only. See Hyser, *supra* note 80, at 526.

200. *Kimbrough v. United States*, 552 U.S. 85, 110 (2007).

201. *Dorsey*, 132 S. Ct. at 2333 (noting that the dissent’s reasoning “would involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long.”).

202. H.R. 265, 111th Cong. § 11 (2009) (“There shall be no retroactive application of any portion of this Act.”).

203. Pub. L. No. 98–473, 98 Stat. 1987.

204. 18 U.S.C. § 3553(a)(4)(A)(ii) (2006).

205. See *Dorsey*, 132 S. Ct. at 2331.

provisions' and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense prior to the new amendments' effective date but were sentenced thereafter."<sup>206</sup> Congress explicitly created a default mechanism in the Sentencing Guidelines such that all changes in sentencing matters should be applied to offenders who had not been sentenced, but not to those whose sentences had been finalized.

The divided Court in *Dorsey* therefore reached the right result but had no need to rely on the Savings Statute presumption articulated in *Marrero*. Once the Court concluded that this was not a case of legislative inadvertence, the presumption should have disappeared.

Strangely, while addressing at length whether to draw a line between those whose punishment had not yet been finalized and those who had yet to commit the offense, the Court in *Dorsey* all but ignored the plight of those sentenced before the FSA who were suffering under what Congress itself had labeled unjustifiable punishment. The majority noted the anomaly but merely remarked that such disparities would exist "unless Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date."<sup>207</sup> The Court continued, "[w]e have explained how in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced."<sup>208</sup> Yet, rarely has Congress concluded that a range of prior sentences was so patently unjust, and one would think more empathy toward those already sentenced would have been appropriate. Congress could and perhaps should have lightened the sentences of those previously convicted, but it stopped short, presumably for some mixture of retributive and instrumental reasons. Congress's refusal to benefit those previously sentenced for crack possession, even those who committed the unlawful conduct on the same day as Mr. Dorsey, should not suggest a want of congressional power. Future Congresses should heed the lesson of the Federal Probation Act<sup>209</sup> and apply ameliorated punishment retroactively where appropriate.

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206. 132 S. Ct. at 2333.

207. *Id.* at 2335.

208. *Id.*

209. *See supra* text accompanying notes 98–101.

## CONCLUSION

The Supreme Court in *Dorsey* reasonably concluded that Congress wished to apply the reduced penalties for crack offenses to those who had yet to be sentenced. Congress's directive in the FSA that all changes be implemented as soon as possible, as well as the general framework of the Sentencing Guidelines, strongly supports that result. Thus, the Court permitted limited retroactivity of Congress's decision to reduce punishment for crack offenders. Nevertheless, the Court missed a critical opportunity to clarify that Congress, if it so chooses, can reach back to benefit those previously convicted of the decriminalized or lightened offense. The traditional concerns militating against retroactive application of new rules are simply absent when Congress decriminalizes an offense or reduces the penalty. Moreover, neither the President's pardon power nor the separation of powers concern in *Plaut* prevents Congress from reducing the penalty for those previously sentenced.

The Court's omission likely stemmed from its overreliance on the Savings Statute. Congress passed that statute merely to limit operation of the common law abatement doctrine and thereby prevent dropping prosecutions whenever Congress altered a penalty scheme, whether increasing or reducing punishment. The Savings Statute is about "saving" prosecutions, not about the retroactive scope of any statute reducing punishment or decriminalizing a statute. Although the Court reached the appropriate result in *Dorsey*, it should have dismantled the presumption that all ameliorative changes be applied only prospectively in the absence of compelling evidence of contrary congressional intent.

In light of diminished deterrence concerns, Congress might decide in appropriate contexts that all offenders should benefit from reduced punishment, irrespective of whether their sentences have been finalized. Future legislatures may resolve to visit the benefits of decriminalizing possession of marijuana on prior offenders. In the alternative, Congress may determine in instances, such as with the FSA, that unraveling prior plea bargains is not worth the candle, and therefore benefit only those offenders whose sentences were not final at the time of enactment. Or, consistent with retributive principles, Congress at other times may decide to benefit solely offenders who commit offenses after the statutory change. In short, courts should assess the retroactivity of any ameliorative change in punishment based on traditional factors of statutory construction, leaving the question of retroactivity in the Legislature's lap.